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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**AUG 20 1996**

**Federal Communications Commission  
Office of Secretary**

In Re Applications of	)	MM Docket No. 93-75
	)	
TRINITY BROADCASTING OF FLORIDA, INC.	)	BRCT-911001LY
	)	
For Renewal of License of Television Station WHFT(TV) Miami, Florida	)	DOCKET FILE COPY ORIGINAL
	)	
GLENDAL BROADCASTING COMPANY	)	BPCT-911227KE
	)	
For Construction Permit Miami, Florida	)	

To: The Commission

**MOTION TO VACATE THE RECORD  
ON IMPROVIDENTLY DESIGNATED ISSUES**

**TRINITY BROADCASTING OF FLORIDA, INC.  
and  
TRINITY BROADCASTING NETWORK**

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## SUMMARY

Dramatic and compelling new information that has come to light since the Initial Decision ("ID") now makes clear that the issues against Trinity in this proceeding were improvidently designated and that Trinity has been the victim of a serious legal error that must be redressed by vacating the record on those issues, finding Trinity fully qualified, and granting Trinity's WHFT(TV) license renewal application.

The new evidence comes from within the Mass Media Bureau and from a videotape of the December 1984 Commission meeting adopting the minority exception to the multiple ownership rules. This evidence, and the applicable legislative history, establish beyond dispute that Trinity's interpretation of the rules was *correct* and that the hearing designation order ("HDO") in this case fundamentally erred in holding that "minority-controlled" for purposes of the minority LPTV lottery preference and the minority exception to the multiple ownership rule meant anything other than beneficial ownership exceeding 50 percent by minorities *without regard to working control*.

The videotape now confirms that when the minority ownership exception was adopted, the Commission clearly understood that it was defining "minority-controlled" to mean beneficial ownership alone. Commissioner Patrick explicitly stated that interpretation at the Commission meeting before the vote, Chairman Fowler declared that Patrick was "exactly right," no one disputed the interpretation, and the vote was unanimous. Furthermore, from an affidavit now given by Alan E. Glasser, the member of the Bureau staff who reviewed the application filed in 1987 by National Minority T.V., Inc. ("NMTV") for Odessa, Texas, it is clear that the Bureau applied the same interpretation of minority control when it granted NMTV's application under the minority ownership exception. And contrary to the Bureau's current position in the case, Glasser asserts that Trinity's

counsel, Colby May, was candid in discussing the application with him and provided all information that Glasser requested.

These revelations have come to light because of a startling and wholly unjustified reversal of position by the Bureau after the Initial Decision in this case on the critical issue of Trinity's intent. Prior to the ID, the Bureau had argued (correctly) that the record establishes no intent on the part of Trinity or its counsel to abuse process or mislead the Commission about the relationship between Trinity and NMTV. Thus the Bureau urged that Trinity should not be disqualified even if its allegedly mistaken view of the law led it to exercise improper *de facto* control over NMTV. However, when the ALJ concluded otherwise in the ID, the Bureau reversed itself and argued in its final *appellate* brief that, based on "further review" of the record, Trinity *should* be disqualified because Trinity's interpretation of the minority ownership exception was "incredible." This new appellate theory is totally undermined by the Glasser affidavit and the 1984 videotape, which establish that Trinity's "incredible" interpretation of the law was in fact reasonable, correct, and applied by the Bureau itself in 1987.

It is inconceivable that the Commission would have designated the Trinity issues in the HDO if it had realized then what Glasser's affidavit and the videotape now prove. In ruling that *de facto* control considerations were relevant under the minority policies at issue, the HDO ignored the legislative and administrative history of those policies. That history shows unmistakably that the beneficial ownership standard (more than 50 percent owned by minorities) was mandated by Congress, and that in reaction to that mandate the Commission adopted the beneficial ownership standard for both the minority LPTV lottery preference and the minority ownership exception. Under that standard, as Commissioner Patrick stated, "minority-controlled" was defined solely with

reference to ownership interests and without regard to whether minorities exercised operating control.

That was exactly how Trinity's counsel always construed it. The Bureau acknowledges that his interpretation was correct as to the minority lottery preference, and thus to that extent the Bureau implicitly concedes that the HDO erred. As to the minority ownership exception, however, the Bureau persists in urging that *de facto* control is relevant. Moreover, by badly misreading Colby May's testimony in its post-Initial Decision "further review" of the record, the Bureau now draws the inference that May actually *knew* that *de facto* control was relevant. To strip a television license based on mere *inference* is dubious under any circumstances, but especially when the inference is patently unfounded. May's consistent and uncontradicted testimony plainly shows that -- as the Bureau itself originally found -- he interpreted the minority ownership exception as an exception to Note 1 ("actual working control") and understood "minority-controlled" as only requiring, in the case of a nonprofit corporation, that a majority of the directors be minorities.

Even if the Commission still cannot conclude that Trinity's legal interpretation was correct, there can be no question that it was at least reasonable under the circumstances. The rule literally said what Colby May construed it to say. The legislative history shows that Congress mandated it. Commissioner Patrick's official statement articulating precisely the same interpretation when the rule was adopted establishes *ipso facto* that the interpretation was reasonable. And we now know from the videotape that this interpretation was expressly shared by Chairman Fowler and undisputed by anyone present when the Commission acted. From the Glasser affidavit, we know too that the Bureau applied that interpretation of the minority ownership exception when it reviewed and granted

NMTV's Odessa application. Whether or not that interpretation is now ruled to have been correct, Trinity was certainly reasonable in *believing* it was correct.

Accordingly, there is no basis for finding that Trinity or its counsel acted in bad faith. If the law did not support their position -- if the rule did not mean what it plainly appeared to say -- then it was hopelessly unclear and failed to give Trinity adequate notice of what was required. A licensee may not be penalized when the agency's rules are ambiguous, especially when the agency itself is internally divided over the proper interpretation. Here, the Bureau and the ALJ (in the ID) differ on the interpretation of the minority LPTV lottery preference, and the Bureau's current interpretation of the minority ownership exception contradicts the interpretation it applied when it granted NMTV's application in 1987. A rule that confuses the agency itself is hardly clear notice to anyone else.

The Commission's treatment of Trinity in this case thus far cannot be reconciled with Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995), *recon. denied*, 3 CR 526 (1996), and Roy M. Speer, 3 CR 363 (1996). In those recent cases, licensees were absolved of intentional wrongdoing, and indeed even spared a hearing, because the law they allegedly violated was not entirely clear at the time and a reasonable licensee would not necessarily have made the same interpretation that the Commission ultimately did. Trinity is similarly situated, and to treat Trinity differently would be an indefensible violation of the principle of Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

This proceeding has been tainted by the erroneous premise of the HDO that *de facto* control considerations were relevant to the question of minority control under the minority policies at issue here. That fundamentally wrong premise, which infected the entire case, produced erroneous prejudicial rulings by the ALJ and a tainted Initial Decision. As a matter of law, the Trinity issues should never have been designated and the hearing should never have been held. To redress this



injustice, the Commission must vacate the record on the improvidently designated issues, grant Trinity's renewal application, and put a stop to this proceeding now.

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**MOTION TO VACATE THE RECORD  
ON IMPROVIDENTLY DESIGNATED ISSUES**

Based on dramatic new information -- which makes clear that the issues against Trinity were improvidently designated -- Trinity respectfully moves for an order setting aside the designation of the Trinity qualifications issues, vacating the record on those issues, and granting the WHFT(TV) license renewal application.

At best, what has occurred is grievous administrative error that the Commission should confront directly and set right. The mistake, even if innocent, was nonetheless a mistake made at Trinity's expense for which Trinity has paid dearly. The very least the Commission can now do is acknowledge its error, correct the record, and bring this unfortunate proceeding to an honorable end.

## I. NEW MATTERS OF DECISIONAL SIGNIFICANCE

### A. The Bureau's Change of Position

This motion has its origin in the decision of the Mass Media Bureau -- *after the Initial Decision* -- to change its position on the critical issue of Trinity's intent and propound in the last appellate pleading a brand new and wholly untenable theory of the evidence. In reviewing the Bureau's startling about-face, Trinity has come upon compelling information which establishes: (a) that the interpretation of the minority exception to the multiple ownership rule (the "minority ownership exception") made by Trinity's counsel, Colby May, and upon which Trinity relied, was not only reasonable but in fact was *entirely correct*; and (b) that this interpretation was followed in 1987 by the Mass Media Bureau itself, which decided *not* to seek more facts about the relationship between Trinity and NMTV when processing the NMTV Odessa, Texas, application for grant under the minority exception because *the minority exception rule required no consideration of such facts*.

Throughout this proceeding, Trinity has maintained that Colby May understood the special definition of "minority-controlled" in §73.3555(e)(3)(iii) (*i.e.* "more than 50 percent owned" by minorities) to be an exception to the *de facto* control policy and to the "actual working control" provision of Note 1 to §73.3555. May's understanding was based, *inter alia*, on the language of the definition itself, on the previously adopted LPTV minority preference which turned on beneficial ownership *per se* without regard to operational control, and on the following description of the minority ownership exception given by Commissioner Dennis Patrick when the minority ownership exception was adopted:

"Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to

diversity. No concern is given as to whether the 51% minority owners *will exert any influence* on the station's programming *or will have any control at all.*" Amendment of §73.3555, 100 FCC 2d 74, 104 (1985) (Separate Statement of Commissioner Dennis R. Patrick Dissenting in Part) (emphasis added).

The Bureau in this proceeding, after participating fully in discovery and the hearing, urged in its proposed findings and again in its reply findings that the weight of the evidence warranted the conclusion that Trinity had not intentionally withheld information from the Commission. While submitting that May's understanding of the minority ownership exception was wrong, the Bureau found that he did hold that understanding and had advised Trinity accordingly. Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law, ¶¶55, 310-11 ("MMB F&C"). The Bureau said that contemporaneous disclosures to the Commission by Trinity and NMTV about their relationship proved that there was no intent to deceive. MMB Rep F&C ¶35. The disclosures in evidence included (a) conversations in which May informed Television Branch Supervisor Alan E. Glasser that Trinity would provide the financing and programming for NMTV and that NMTV Director Jane Duff was a Trinity employee (TBF Ex. 105, p. 17; Tr. 3231-38), and (b) May's follow-up discussion with Video Services Division Chief Roy J. Stewart, in which the focus of Stewart's interest was the NMTV Bylaws and the voting rights of the Directors (TBF Ex. 105, p. 17 and Tab Q).

When the Initial Decision did not adopt the Bureau's view that Trinity had acted in good faith, the Bureau altered its position. Responding to the ID -- two years after the hearing had ended and after twice having urged the ALJ that the record showed no intent to deceive -- the Bureau now suggested that the ALJ's denial of Trinity's renewal application should be affirmed because that aspect of the ID was "supported by substantial record evidence." Mass Media Bureau's Limited Exceptions

To Initial Decision, January 23, 1996, pp. 1-2 ("MMB Exceptions").<sup>1</sup> Significantly, the Bureau at that point did not claim that the *preponderance* of the evidence (the *correct* standard for Commission review of an initial decision) warranted denial of renewal. Nor did the Bureau specify which evidence in particular supported the ALJ's conclusion, or explain why any such evidence was no longer outweighed by Trinity's contemporaneous disclosures and its reliance on counsel's legal interpretation.

The Bureau completed its reversal a month later in the last appellate pleading, when it argued for the first time that the "weight of the evidence" indicated that Trinity *did* intend to deceive the Commission. Mass Media Bureau's Consolidated Reply To Exceptions, February 28, 1996, p. 14 ("MMB Reply"). Thus, in the space of a month and on the same record, the Bureau moved from (a) recognizing that the evidence *negates* any intent to deceive, to (b) suggesting that "substantial" evidence *supports* a finding of intent to deceive, to (c) contending that the "weight" of the evidence *establishes* intent to deceive. To explain its change, the Bureau announced its new theory of the evidence -- a theory it had not previously offered, a theory on which the ALJ's conclusions had not relied, and a theory totally at odds with the Bureau's own proposed findings in the case. According to the Bureau's new theory, May knew that his legal interpretation of the minority ownership exception was wrong, he deliberately withheld relevant information from Glasser and Stewart when he spoke with them, and his testimony that he based his advice to Trinity on his legal interpretation is "incredible." MMB Reply, pp. 15-16. Further, says the Bureau, May's lack of candor is attributable to Trinity principal Paul Crouch. Id., pp. 16-17. As for the Commission's exoneration of a similarly situated licensee in Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995) ("Fox"),

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<sup>1</sup> The Bureau's exceptions were devoted almost entirely to urging that the competing applicant for Trinity's license, Glendale Broadcasting Company ("Glendale"), be disqualified for misrepresentations and lack of candor of its controlling owner, George Gardner.

*recon. denied*, 3 CR 526 (1996) ("Fox Reconsideration"), that case is inapposite, argues the Bureau, because there "the underlying law was not settled at the time of the representations at issue," whereas here, because the law was so clearly settled, it is "incredible" that May and Crouch could have believed May's interpretation. MMB Reply, pp. 16-18.

The Bureau's new theory -- a demonstrably erroneous inference based on gross distortions of Colby May's testimony -- obviously would have grave consequences if adopted as the decision in this case. Denial of Trinity's renewal application on the ground that May lacked candor in discussions with the agency's staff and testified falsely in this proceeding would impose the death sentence on Trinity in Miami and end the outstanding community service that WHFT(TV) now provides, would threaten the survival of the entire Trinity network and its service to needy people throughout the country, and would stigmatize May as a perjurer and destroy his professional career. Only the most compelling sort of evidence and scrupulous observance of fair procedures could justify consequences that extreme. Here, however, the Bureau's very serious accusation is untenable on the merits and is made at a time when Trinity ordinarily could not respond.<sup>2</sup>

#### **B. The Glasser Affidavit**

In an effort to fathom the Bureau's abrupt and puzzling reversal, Trinity sought to determine what steps the Bureau had taken during the pre-designation phase, and later during the hearing, to ascertain what facts might support its theory. Toward that end, Trinity contacted Glasser (now retired from the Commission) to get his first-hand account of his discussions with May. What Trinity learned is set out in Glasser's sworn declaration attached to this motion at **Tab 1**.

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<sup>2</sup> The Bureau has introduced its theory why Trinity should be disqualified in the last appellate pleading. The pleading cycle prescribed in §1.277 gives no right to answer matters raised in a reply.

Glasser reveals, first, that no one at the Commission *ever* contacted him about his review of NMTV's application or "any of my discussions with Colby May." **Tab 1, ¶3.** This means that when the Hearing Designation Order ("HDO") charged Trinity with abuse of process, the Commission lacked the benefit of the first-hand account of the staff member with whom Trinity's counsel held the discussions that are said to be the heart of Trinity's misconduct. It also means that the Bureau, which could have corroborated Trinity's testimony on that issue by presenting an eyewitness member of its own staff, failed to do so. And it means that the Bureau, through a series of *inferences* raised in its last appellate brief, has accused May of misleading Glasser without getting the *facts* from Glasser.

Contrary to the Bureau's groundless accusation, Glasser further states unequivocally that he found that May was "forthright" and "responsive" and "supplied all information that I had requested." **Tab 1, ¶4.** Indeed, Glasser makes it clear that the information supplied by May not only served to apprise Glasser that the control and working relationship between Trinity and NMTV was very close, but gave him concern as to whether the relationship complied with Commission policy and caused him to raise that issue with the senior staff. *Id.*, ¶¶3-4. So the Bureau is now urging Trinity's disqualification based on May's inferred lack of candor with a staff attorney who, if the Bureau had simply asked, would have confirmed the Bureau's *original* position that May did *not* lack candor.

Most important of all, Glasser asserts that when, after his discussions with May, he raised within the Bureau his concern about the relationship between Trinity and NMTV and asked whether he should request further information to show compliance with the minority ownership exception, *he was told that such information was unnecessary and that review of NMTV's Bylaws was sufficient.*

**Tab 1, ¶4.** Glasser's account is fully consistent with May's contemporaneous letter to the Bureau, which enclosed the Bylaws and pointed out that directors' action under the Bylaws required only a

majority vote, not a unanimous vote. TBF Ex. 105, p. 17 and Tab Q. Glasser's disclosure completely undermines the Bureau's current position. It proves that the reason May did not provide more detailed information was not that he meant to conceal anything, but that the *Bureau* deemed such information unnecessary under the Commission's minority ownership exception and saw no need for Glasser to bother asking for it. In short, we now learn, the Bureau applied the minority ownership exception in 1987 *exactly the same way May understood it!*

This raises a profound question: If, as the Bureau claims, Note 1 and the *de facto* control policy so obviously applied to the minority ownership exception that it was "incredible" that May believed otherwise, why were Glasser's concerns about Trinity's relationship with NMTV treated by the Bureau in 1987 as irrelevant? To that question there is a simple and conclusive answer -- an answer no longer subject to dispute in light of *something else* Trinity has uncovered. The answer is that the minority ownership exception, adopted as an amendment to §73.3555, was indeed an *exception* to Note 1 and the *de facto* control policy. That construction -- stated by Commissioner Patrick, embraced by May, and followed by the Bureau -- is hardly incredible. It is, we now know from the Commission Chairman who presided over its adoption, "exactly right." Thus, the Bureau was correctly applying the Commission's policy when Glasser was told that there was no need for further information about the actual working relationship between Trinity and NMTV.

### C. The Videotape

In the process of trying to learn why the Bureau took a position in 1987 that it now brands "incredible," Trinity managed to locate the videotape of the open meeting on December 19, 1984, where the Commission adopted the minority ownership exception. The videotape is attached at **Tab 2** and a certified transcript is attached at **Tab 3**. These records make clear that Commissioner



Patrick's statement that the minority ownership exception to the rule was an exception to the usual considerations of actual working control (*see* pp. 2-3 supra) is *precisely* what the Commission intended. At the meeting, after the Bureau staff presented the agenda item and explained that for the purpose of the minority ownership rules "minority control shall be defined as having a greater than 50% minority ownership interest in a broadcast facility" (Tab 3, p. 5), Commissioner Patrick explained why he did not support that aspect of the Commission's action. He stated:

"Under *the majority's plan*, the nexus between the use of racial classifications and the promotion of diversity interests is just too tenuous. Under *the majority's plan*, the right to purchase broadcast stations over the established ceiling *turns upon the race of the proposed owners alone*. No further showing is required with respect to how these new owners may contribute to the issue, the compelling state interest at issue here -- diversity. *No concern is given as to whether the 51% minority owners will exert any influence whatsoever on the station's programming or will have any control at all.*" Tab 3, p. 10 (emphasis added).

Although all Commissioners and the Bureau staff who prepared the item were listening, none disputed Commissioner Patrick's assertion that minority ownership *per se*, without concern for control, qualified for the minority ownership exception under the policy being adopted. To the contrary, Chairman Mark Fowler, speaking the final word on the subject before the vote, stated:

"*I do agree with Commissioner Patrick's comments. I think he has it exactly right.*"  
Tab 3, p. 13 (emphasis added).

With that, all five Commissioners voted to adopt the item. Id.

If there was any doubt that Commissioner Patrick and Chairman Fowler were accurately describing the Commission's new policy, the full Commission officially and categorically confirmed their position in June 1985. At the December 1984 open meeting, the Chief of the Mass Media Bureau, responding to a concern that one of the existing attribution rules might undermine the new minority ownership exception, said that a rule making notice would be prepared to address that

concern. **Tab 3**, p. 6. In June 1985, the Commission adopted that notice. The document, Reexamination of the "Single Majority Stockholder" and "Minority Incentive" Provisions of Section 73.3555 of the Commission's Rules and Regulations, FCC 85-303, released July 1, 1985, 50 Fed. Reg. 27629 (July 5, 1985) ("Minority Incentive Reexamination") is attached to this motion at **Tab 4**. It conclusively establishes that the ownership *per se* policy that Commissioner Patrick described, that Chairman Fowler endorsed, that Colby May understood, and that the Bureau followed in approving NMTV's Odessa application, was in fact the policy the Commission adopted.

In Minority Incentive Reexamination, the Commission expressed its concern that the minority ownership exception it had recently added to §73.3555 might be undercut by the "single majority stockholder" attribution exemption, which exempts from attribution the ownership interests of all non-majority stockholders in corporations where one party holds a majority of the voting stock. **Tab 4**, pp. 1-2 (¶2). Under the minority ownership exception, parties who provide investment and support for minority owned stations may hold attributable interests in two additional stations. **Tab 4**, pp. 2-3 (¶¶3-5). Since the single majority stockholder attribution exemption allowed unlimited non-attributable interests, while the minority ownership exception limited parties to two attributable interests (and only in minority owned entities), the Commission worried that the single majority stockholder provision might be much more attractive to investors and significantly divert investment from minority stations, diluting the effectiveness of the minority ownership exception. **Tab 4**, p. 3 (¶5). Seeking comments on that concern, the Commission described how the two policies were intended to operate, and in so doing conclusively established that the understanding of the minority ownership exception articulated by Patrick, reiterated by Fowler, undisputed by the other Commissioners, shared by May, and applied by the Bureau was indeed "exactly right."

First, the Commission left no doubt at all that it meant exactly what it said when it defined “minority-controlled” in §73.3555(e)(3)(iii) as “more than 50 percent *owned*” by minorities (emphasis added). Addressing the minority ownership exception, the Commission expounded:

“For purposes of these provisions, ‘minority-controlled’ broadcast stations are defined as those in which *more than 50 percent of the equity interest is owned* in the aggregate by persons who are members of a minority group.” Minority Incentive Reexamination, Tab 4, p. 3 (§4) (emphasis added).

This standard, said the Commission, was *different* from the standard in the single majority stockholder attribution exemption:

“[T]he ‘single majority stockholder’ exception is limited to situations in which more than 50 percent of the *voting stock* is owned by a single person. Under the ‘minority incentive’ policy, in contrast, *ownership* interests of minority group owners are aggregated in computing control and, consequently, there is no requirement that any one person possess an *equity interest* in the business that exceeds 50 percent.” Id., Tab 4, p. 4 (§6) (emphasis added).

Thus, the Commission could not have been clearer in distinguishing “voting” ownership from mere “equity” ownership. The single majority stockholder attribution exemption applied when one stockholder owned a majority of the “voting” stock, whereas the minority ownership exception applied when minority persons owned a majority simply of the “equity” (just as Commissioners Patrick and Fowler had said).<sup>3</sup>

The Commission also left no doubt *why* it had based eligibility for the minority ownership exception on equity ownership rather than on the control considerations that govern the single

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<sup>3</sup> As discussed at p. 39 *infra*, the Commission is well aware that the term “equity ownership” includes interests held by inactive and non-influential owners, such as trust beneficiaries and passive limited partners. In focusing exclusively on the percentage of minority *equity* ownership, the Commission was taking the same approach with the minority ownership exception that it had taken in 1983 with the minority LPTV lottery preference (where such passive ownership interests qualified for the preference), exactly as Colby May concluded. See pp. 18-30 *infra*.

majority stockholder attribution exemption. Discussing the concern that investors might find the single majority stockholder attribution exemption more attractive than the minority ownership exception, the Commission explained the fundamental difference between the policies that gave investors countervailing advantages under the minority ownership exception. Specifically, the Commission pointed out that the single majority stockholder provision sought to classify as *non-cognizable* those interests that carried no ability to influence or control the licensee's affairs. Minority Incentive Reexamination, Tab 4, p.1 (¶2), pp. 4-5 (¶9). To attribute such non-influential ownership interests would "be at odds with the objectives underlying the attribution rules," since the non-majority stockholders "do not in fact possess an influential ownership interest which should be deemed cognizable under the media multiple ownership rules." Tab 4, p. 5 (¶9).

In distinct contrast, the minority ownership exception was designed to classify as *cognizable* those interests that the Commission specifically contemplated would influence or control the licensee's affairs. A cognizable interest, said the Commission, is one that "conveys to the holder the ability to *materially influence or control* the business affairs of our licensees." Minority Incentive Reexamination, Tab 4, p. 1 (¶2) (emphasis added). Such interests "are designed to measure what ownership interests will confer that amount of *influence or control* which must be limited." Tab 4, pp. 5-6 (¶10) (emphasis added). Furthermore,

"The determination that a certain stock interest or other position might confer such *influence or control* is equally valid regardless of the particular context of rule in which it is applied." Tab 4, p. 6 (¶10) (emphasis added).

Accordingly, by allowing broadcasters to acquire cognizable interests in two additional stations under the minority ownership exception, the Commission intended that such broadcasters could, and expected that they would, materially influence or even *control* the minority licensee's

affairs. In fact, the Commission had recently affirmed its *presumption* that the holder of *any* cognizable interest *does control* the licensee. See pp. 40-41 *infra*. Thus, the Commission said, the capacity to influence or control the additional stations allowed by the minority ownership exception is precisely what could make the minority ownership exception more attractive to an investor than a non-cognizable interest under the single majority stockholder attribution exemption. As the Commission put it:

“[R]elative to use of the 'single majority stockholder' rule, an investment in a minority-controlled company may be attractive to persons occupying -- or desiring to retain the option to occupy -- cognizable corporate positions. This aspect of the 'minority incentive' provisions may constitute a substantial advantage over the 'single majority stockholder' approach in the view of significant investors because it affords them *a means* short of majority stock control *by which to ensure the continued viability of their investment*.” Tab 4, p. 4 (¶7) (emphasis added).<sup>4</sup>

In short, the Commission explained, the purpose of the minority ownership exception was to encourage investment in stations in which “more than 50 percent of the equity interest” is owned in the aggregate by minorities. Tab 4, p. 3 (¶¶4-5). To achieve this goal, the Commission deliberately created an incentive that would give broadcasters who furthered the policy the means to ensure the viability of their investment. Tab 4, p. 4 (¶7). The incentive chosen was to grant such broadcasters cognizable interests, which by Commission definition allowed them “to materially influence or control” the entity in which they were investing. Tab 4, p. 1 (¶2), pp. 5-6 (¶10). For that reason, the Commission did not require the minority owners to demonstrate that they had actual working control, but only that they held “more than 50 percent of the *equity* interest.” Tab 4, p. 3 (¶4)

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<sup>4</sup> In comments responding to the Minority Incentive Reexamination NPRM, a highly respected broadcast group, The Washington Post Company, and its counsel, Covington & Burling, expressly recognized that the intent of the minority ownership exception was to permit broadcasters to “control” the additional minority-owned stations as an inducement for broadcasters to invest in such stations under the policy. See p. 39 *infra*.

(emphasis added). That was the Commission's policy, and the Bureau followed the policy correctly in response to Glasser's concerns about NMTV's Odessa application.

#### **D. Action Required To Correct Error**

To a legal and moral certainty, therefore, this proceeding against Trinity should never have been started. As fully discussed below, the HDO specifying the Trinity qualification issues did not even superficially examine the minority policies that Trinity is accused of violating, and consequently took actions against Trinity that were plainly erroneous. Further, those core errors led to irreparably tainted proceedings. Moreover, the designation of this proceeding against Trinity cannot be reconciled with the Commission's decisions that hearings were *not* warranted under the same circumstances in Fox and Roy M. Speer, 3 CR 363 (1996) ("Speer"), and in that respect is an indefensible violation of the principle of Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Indeed, if the law in this case (unlike Fox) was well settled, as the Bureau says, that is only because it was settled that Colby May's interpretation was completely right.

The time has come to correct this profound error. Under §1.106(a)(1) of the rules, Trinity did not have the right to challenge the HDO before the ALJ or the Review Board. Now that the case has been certified to the Commission, Order, FCC 96R-15, released May 3, 1996, and since the Commission has not specified procedures by which exceptions filed with the Review Board may be supplemented to address matters that could not be raised to the Board, this motion is an appropriate means to raise such matters. Moreover, since the Bureau only presented its arguments for Trinity's disqualification in its final appellate brief, elementary due process entitles Trinity to respond. And further, Alan Glasser's astounding revelations constitute highly relevant new evidence from within the Bureau that was not presented by the Bureau at the hearing and must be entertained in the interest

of fundamental fairness. See Fox, pp. 4-5 supra. These are matters of extraordinary public importance that mandate the Commission's full attention. Trinity has spent more than three years embroiled in hearings that were totally unwarranted. All Trinity asks is that the Commission do what is right and halt this proceeding now.

Toward that end, Trinity respectfully moves for an order (a) setting aside the improvident designation of the Trinity qualification issues; (b) expunging the record on those issues, including the evidence adduced at hearing on those issues and all pleadings and other filings (or portions thereof) made in regard to those issues; and (c) vacating the findings of fact and conclusions of law on those issues in the Initial Decision. Having taken these actions, the Commission, as requested in Trinity's Exceptions to the Initial Decision, should proceed to (a) disqualify Glendale for repeated misrepresentations and lack of candor; (b) award Trinity a dispositive renewal expectancy under the comparative issue if Glendale is not disqualified; and (c) grant Trinity's application. Such an order will bring a just conclusion to a proceeding that never should have commenced.

## **II. THE TRINITY ISSUES WERE IMPROVIDENTLY DESIGNATED**

### **A. The Designated Issues**

In April 1993, the Commission designated Trinity's application for renewal of WHFT(TV)'s license for hearing. Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475 (1993) ("HDO"). The HDO specified the following basic qualification issues against Trinity:

"(a) To determine whether Paul F. Crouch, Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network (TBN) or its affiliates exercised *de facto* control over National Minority TV, Inc. (NMTV).

"(b) To determine whether NMTV, Paul F. Crouch, TBN or its affiliates or principals abused the Commission's processes by using NMTV to evade the provisions of

Section 73.3555(e) of the Commission's Rules and/or by using NMTV to improperly claim minority preferences in LPTV applications.

“(c) To determine, in light of the evidence adduced pursuant to issues (a) and (b), whether Trinity Broadcasting of Florida, Inc., is qualified to remain a Commission licensee.” *Id.* at 2481.

The HDO thus involved three Commission policies: (a) the *de facto* control policy, (b) the policy underlying the minority ownership exception in §73.3555(e), and (c) the minority LPTV lottery preference policy. Since disqualification for *de facto* control or abuse of process requires intent to conceal,<sup>5</sup> the HDO also placed Trinity's intent at issue.

In opposing designation, Trinity had argued that the minority LPTV lottery preference arose from a Congressional mandate that expressly excluded considerations of operational control, that the policy underlying the minority ownership exception was similar to the minority LPTV lottery preference policy, that the *de facto* control policy therefore did not apply to the relationship between Trinity and NMTV, and that Trinity did not intend to deceive. *See* pp. 71-75 *infra*. The HDO, however, was premised on the Commission's conclusion that the *de facto* control policy did apply for purposes of both the minority LPTV lottery preference and the minority ownership exception. In designating the *de facto* control issue, the Commission stated:

“We reject the contention that the minority-control portion of our multiple ownership rules precludes us from looking beyond mere legal ownership of a licensee .... [W]e specifically reject the thesis that 'ownership' and not 'control' is the only benchmark the Commission may use in determining compliance with the Commission's multiple ownership rules relating to minority-controlled entities.” 8 FCC Rcd at 2477 (¶13), 2480 (¶37).

Having made that ruling, the Commission then also designated the abuse of process issue, stating:

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<sup>5</sup> Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6907 (1991); Evansville Skywave, Inc., 7 FCC Rcd 1699, 1702, n. 10 (1992).



“Thus, if TBN and/or Paul Crouch controlled NMTV from the outset and that fact had been disclosed, NMTV would not have been entitled to minority preferences in numerous LPTV lotteries. Moreover, NMTV would not have been allowed to acquire television stations which, in combination with the TBN-owned television stations, exceeded the limits of the Commission's multiple ownership rules.” *Id.* at 2480 (¶38).

Accordingly, the designation of both issues turned on the conclusion that the locus of operating control determined whether an entity qualified for the minority LPTV lottery preference or the minority ownership exception. Remarkably, however, none of the cases cited in the HDO for that proposition involved *either* of those minority incentives. The HDO said not one word about the origins and purposes of the minority LPTV lottery preference, or about the history and policy rationale of the minority ownership exception. Nor did it cite any *prima facie* showing that Trinity had intended to deceive the Commission. To the contrary, it specifically found that no such showing had been made. 8 FCC Rcd at 2480 (¶39). Ill-considered as it was, the HDO nonetheless launched an arduous legal proceeding that has so far consumed more than three years.

The proceeding has now reached the Commission, at a time when the Bureau has just reversed positions and introduced a new theory about Trinity's intent, and when new evidence from within the agency exonerates Trinity. This motion is Trinity's first opportunity to contest the legal infirmity of the HDO, answer the Bureau's revised theory of the case, and address the critical new evidence. As Trinity demonstrates below, (a) the fundamental premise of the HDO is erroneous because, as a matter of law, operating control was not determinative under the minority LPTV lottery preference or the minority ownership exception; (b) if the Commission's policy was otherwise (as the HDO stated), then that policy was extraordinarily unclear and did not give adequate notice of Commission